STATE OF MICHIGAN

COURT OF APPEALS

LINDA M. ORBACH-SHEAR, Plaintiff-Appellee,	UNPUBLISHED February 19, 2008
v	No. 272961 Oakland Circuit Court
GEOFFREY E. ORBACH, Defendant-Appellant.	LC No. 1995-502158-DM

Before: Saad, C.J., and Borrello and Gleicher, JJ.

PER CURIAM.

Defendant appeals by leave granted an order awarding plaintiff attorney fees in this postjudgment divorce action. We affirm in part, reverse in part, and remand.

I. Underlying facts & procedure

Plaintiff and defendant married on October 23, 1983, and their marriage produced two daughters. In March 1996, a consent judgment of divorce granted the parties joint legal custody of the children, awarded plaintiff physical custody of the children, and provided defendant visitation pursuant to a mediated agreement. Postjudgment litigation between the parties intensified on July 24, 2003, when plaintiff filed a motion for modification or clarification of defendant's parenting time. Plaintiff alleged that defendant's new wife subjected the children to yelling and verbal abuse. Plaintiff also asserted that defendant and his wife often arrived late for scheduled child custody exchanges, and that they denied plaintiff any contact with the children when they visited defendant. According to plaintiff, defendant's wife verbally disparaged her to the children, failed to accommodate the youngest daughter's special needs stemming from her attention deficit hyperactivity disorder, and had locked the younger child out of defendant's home, forcing her to walk to plaintiff's residence. Plaintiff additionally complained that defendant refused to provide her with a copy of the eldest daughter's videotaped Bat Mitzvah ceremony. The trial court ordered the parties to submit to psychological evaluations, and directed that defendant allow plaintiff to copy the Bat Mitzvah recording.

Plaintiff recounted that in late 2003, after the completion of her psychological evaluation, but before she learned of its content, defendant and his wife discussed with the children confidential information from the report, and that falsified versions of the report were disseminated to many individuals and organizations familiar with plaintiff. Plaintiff thus moved to suspend defendant's parenting time, alleging that either he or his wife bore responsibility for

the improper dissemination and discussion of the psychological evaluation. In February 2004, plaintiff served defendant a subpoena to produce his home computer for analysis by a forensic expert, to determine if the revisions to plaintiff's psychological evaluation and the improper communications originated from defendant or his household.

After the trial court entered a May 2004 order compelling production of defendant's home computer, he eventually produced one for forensic analysis. Examination of the computer's hard drive revealed no files that could be linked to the altered psychological evaluation or the improperly disseminated documents. The forensic analyst noted, however, that while he initiated his examination of the computer on June 24, 2004, the computer "showed that it had a last access data of 11-09-2003." In July 2004, plaintiff filed a motion for contempt, arguing that defendant had violated the trial court's order to compel by not turning over all his home computers in light of (1) defendant's indication to the forensic analyst that he was turning over the "children's computer," (2) the evidence that someone had opened the hard drive casing, and (3) the fact that the computer had not shown any use for months, despite the presence of defendant, his wife, and her two high-school-aged children in the home. On August 4, 2004, the trial court ordered defendant to reimburse plaintiff the forensic analysis costs of $1,500, found defendant "responsible for drafting and disseminating 'the document' that addressed the court ordered psychological evaluation," and reserved ruling on plaintiff's request for attorney fees.

On November 4, 2004, defendant filed a motion to disqualify Judge Linda Hallmark and Friend of the Court (FOC) Referee Traci Rink from presiding over further proceedings on the basis that they possessed a bias against the defense. Defendant complained that their bias and impartiality stemmed from their improper review of letters and documents defendant's wife had prepared and forwarded to the Oakland Circuit Court's chief judge, the Oakland Psychological Clinic, and an FOC family counselor regarding allegations of Judge Hallmark's bias. According to defendant's motion, the documents came into the possession of Judge Hallmark's research attorney, who turned them over to Referee Rink. Defendant characterized the documents, which appeared nowhere in the trial court file, as confidential and prejudicial. Defendant concluded that the court's repeated rulings against him substantiated its possession of an actual bias against him. In December 2004, defendant's motion to disqualify Judge Hallmark was denied, and his request for disqualification of the referee was forwarded to the FOC administrator.

Also in December 2004, plaintiff filed an emergency motion to suspend defendant's parenting time and for a final determination on her original July 2003 motion concerning parenting time issues. The trial court entered an order requiring that weekly counseling continue for the children, and that the parties again present themselves and the children for psychological evaluations geared toward ascertaining appropriate parenting time modifications. The trial court ordered that in the interim the parties adhere to the "status quo," and that concerns pertaining to production of the Bat Mitzvah tape by defendant would be addressed in ongoing proceedings before the FOC. In addition, the court ordered that "[a]ll attorney fees are reserved."

On April 12, 2006, the FOC referee issued findings of fact. The referee summarized defendant's testimony that "[o]n direct examination of defendant by counsel for plaintiff, defendant stated that he could not recall whether he lied about the tape's existence. He stated that if he did, he might have done so in anger in response to plaintiff's withholding of the children. He stated that he did not have the tape in his possession and that it may be lost." Defendant's mother testified that in July 2003, she viewed the tape with defendant's father at

Providence Hospital, and that after they watched the video defendant's wife placed it in her purse. The referee found that "the last known location of [the] . . . Bat Mitzvah video was with defendant's wife," and that defendant or members of his household thus possessed the tape. The referee recommended that defendant turn the tape over to plaintiff or pay her $2,500. Defendant filed objections to the referee's findings, including that plaintiff never proved that she lawfully owned the Bat Mitzvah videotape or the "rights" to the recording. He also suggested that plaintiff's failures to contribute monetarily to the costs of the ceremony or the child's religious training likewise precluded her entitlement to the tape.

On May 2, 2006, plaintiff filed a motion for attorney fees. In support of plaintiff's request, she emphasized her much lower annual income than defendant's, and cited his failure to cooperate in producing the Bat Mitzvah videotape, his failure to turn over his subpoenaed home computer for forensic analysis, the trial court's determination that defendant or members of his household had improperly disseminated information from the psychological evaluations, among other dilatory and improper actions by defendant and his family members. Defendant objected to any award of attorney fees, characterizing his actions as merely a "vigorous [d]efense" of his legal rights. Defendant contended that plaintiff had behaved unreasonably and had unnecessarily prolonged the litigation by objecting to the FOC and psychological recommendations, and by pursuing false and inflammatory allegations concerning defendant's behavior. Although defendant neglected to provide substantiation of any fees he allegedly incurred, defendant requested reimbursement of $47,581.44 for his attorney fees and "all other expenses associated with this litigation."

At a hearing on June 27, 2006, the trial court initially determined that it would not consider defendant's motion for attorney fees because he neither complied with the court's motion praecipe procedures nor properly served the motion on plaintiff's counsel. During the hearing, defendant acknowledged that he did not dispute "the Referee's finding of constructive ownership or possession," but he insisted that the Bat Mitzvah videotape "has been lost." Relying on federal copyright law, defendant also continued to contest plaintiff's ownership of or entitlement to the videotape.

Plaintiff presented testimony concerning her income, the history of the litigation, and the attorney fees and expenses she had incurred, and requested reimbursement of $44,546.72 in attorney fees, and $2,326 in costs associated with her share of the depositions and psychological evaluations. In response, defendant denied that he had sufficient funds to pay plaintiff's attorney fees, and remarked that "[a] judgment in this case to me would force personal bankruptcy, which would cost the loss of my job no questions asked."

The trial court ruled, in relevant part, as follows:

> I'm going to assess the initial fees between July and November to the plaintiff, make her responsible for payment of those fees. However, since November of 2003, I think the unreasonable conduct of the defendant has caused these fees. We have already found the dissemination of the psychological report, the refusals to turn over the information regarding the computer, on and on and on this has gone. Even the conduct today is unreasonable.
>
> I believe you have a lot of anger, sir, but you have caused the attorney

> fees. And I'm going to assess $44,546.00 in fees to the defendant, also the cost of 2,326 for a total judgment of $46,872.00.
>
> Further, I believe that should be added to the child support arrearage as child support, and repaid to the plaintiff. And you can pay it over time, sir. You don't have to pay it in a lump sum, but those fees needs to be reimbursed to her. And once they are child support, you cannot discharge them in bankruptcy. . . .
>
> * * *
>
> You've refused consistently to turn it [the videotape] over, sir. Again, it's curious, and I can see why the psychological was originally ordered, because it doesn't add up. The actions are so extreme compared to what the problem is that it is difficult to even fathom what is going on in your mind.
>
> But again the videotape needs to be turned over. If it is not turned over in the next two days, then the additional cost of $2,500.00 should be assessed. This clearly fits within the court rule regarding unreasonableness of the conduct and also the statute [MCL] 552.13. The *Reed* [*v Reed*, 265 Mich App 131; 693 NW2d 825 (2005),] case talks about the grant of attorney fees, and if there is a causal relationship between the fees that were incurred and the conduct, fees can be assessed after an evidentiary hearing is conducted. This clearly fits within the *Reed* case as well.
>
> Finally, there is clearly a disparity of the income, but that alone would not have caused the Court's order, had it not been for the conduct. So for those reasons, I will enter an order . . . .

On July 27, 2006, the trial court entered an order requiring "that the amount of $49,372.00 shall be added to the Defendant's child support obligation as arrearage and shall be paid at the rate of $1,299.26 per month in addition to his regularly [sic] child support obligation of $1,400.00 per month. A Uniform Child Support Order is incorporated by reference." The trial court thereafter denied defendant's motion to set aside its attorney fee award, explaining that "[t]here were sufficient grounds for attorney fees under MCR 3.206(C)," and noting that the "award was based both on the disparity of income and Defendant's unreasonable conduct during litigation.

II. Analysis of questions presented

A

On appeal, defendant first contends that the trial court erred by considering the disputed issues because language in the divorce judgment required the parties to first submit parenting time disputes to mediation. Because the rules of contract interpretation apply to consent judgments, we review de novo the trial court's interpretation as a question of law. *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 426; 670 NW2d 651 (2003); *Young v Robin*, 146 Mich App 552, 557-558; 382 NW2d 182 (1985).

The divorce judgment provides that "[i]f a visitation dispute arises, the parties will submit unresolved issues to mediation as a condition precedent to Court involvement." Plaintiff's first motion to modify parenting time reflected that the parties unsuccessfully pursued mediation of their visitation concerns, which defendant does not dispute. In fact, defendant's brief on appeal acknowledges that the parties commenced arbitration of their parenting time impasse, but could not resolve their dispute because of oppositional behavior by plaintiff and defendant's wife. Defendant's questioning of plaintiff at the June 27, 2006 hearing also at least implicitly recognized that the parties had attended mediation on three occasions, albeit unsuccessfully, before proceeding to the court for resolution of their disputes.

Furthermore, the judgment of divorce requires that the parties submit parenting time issues to mediation before petitioning the court. By its plain terms, the judgment does not mandate the resolution of all the parties' postdivorce disputes through mediation, and does not preclude resort to a court petition if mediation ends unsuccessfully. On the basis of defendant's own acknowledgment, we find that the parties complied with this provision of the divorce judgment. As this Court recognized in *Dick v Dick*, 210 Mich App 576, 587; 534 NW2d 185 (1995), "[t]he requirement of a hearing, if voluntary nonbinding mediation fails, is equally understandable. If mediation is chosen and fails, the custody dispute remains to be resolved and, save intervention by the courts, there is no other means of resolution."

B

Defendant also insists that the trial court's grant of attorney fees to plaintiff ignored the following language in the divorce judgment:

> IT IS FURTHER ORDERED AND ADJUDGED that each party shall be responsible for his or her own attorney fees, incurred during the pendency of this divorce proceeding, and hold the other party harmless for same.

But defendant's argument, that this language did not permit an award of attorney fees, ignores the limiting language applying the attribution of payment for attorney fees to each party only "*during the pendency of this divorce proceeding.*" (Emphasis added). Defendant misconstrues the meaning of this language by interpreting "divorce proceeding" in an overly broad manner to encompass postjudgment matters. The inclusion of this language within the judgment does not prohibit a party from later seeking reimbursement of attorney fees and expenses incurred during the parties' postjudgment disputes.

Moreover, a Michigan statute and a court rule both authorize the trial court's award of attorney fees and costs under the instant circumstances. "[A]ttorney fees in divorce actions are not recoverable as of right." *Stackhouse v Stackhouse*, 193 Mich App 437, 445; 484 NW2d 723 (1992). However, "[a] party to a divorce action may be ordered to pay the other party's reasonable attorney fees if the record supports a finding that such financial assistance is necessary to enable the other party to defend or prosecute the action." *Id.*, citing MCL 552.13(1). "This Court has also held that an award of legal fees is authorized where the party requesting payment of the fees has been forced to incur them as a result of the other party's unreasonable conduct in the course of the litigation." *Id.* "We review a trial court's [ultimate] grant or denial of attorney fees for an abuse of discretion. Any findings of fact on which the trial

court bases an award of attorney fees are reviewed for clear error, but questions of law are reviewed de novo." *Reed, supra* at 164.

In MCL 552.13(1), the Legislature has authorized as follows the imposition of fees and costs in divorce actions:

> *In every action brought, either for a divorce or for a separation, the court may require either party* to pay alimony for the suitable maintenance of the adverse party, to pay such sums as shall be deemed proper and necessary to conserve any real or personal property owned by the parties or either of them, and *to pay any sums necessary to enable the adverse party to carry on or defend the action, during its pendency*. It may award costs against either party and award execution for the same, or it may direct such costs to be paid out of any property sequestered, or in the power of the court, or in the hands of a receiver. [Emphasis added.]

The language of MCR 3.206(C) provides as follows:

> (1) A party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action or a specific proceeding, including a post-judgment proceeding.
>
> (2) A party who requests attorney fees and expenses must allege facts sufficient to show that
>
> (a) the party is unable to bear the expense of the action, and that the other party is able to pay, or
>
> (b) the attorney fees and expenses were incurred because the other party refused to comply with a previous court order, despite having the ability to comply.

The trial court referred to both these provisions to justify its finding that defendant had responsibility to reimburse attorney fees and costs to plaintiff.

When construing a court rule, this Court applies the legal principles that govern statutory construction. *In re KH*, 469 Mich 621, 628; 677 NW2d 800 (2004). We begin by considering the statute's or court rule's plain language. "When that language is unambiguous, we must enforce the meaning expressed, without further judicial construction or interpretation." *CAM Constr v Lake Edgewood Condo Ass'n*, 465 Mich 549, 554; 640 NW2d 256 (2002) (internal quotation omitted).

In light of the court rule's clear and unambiguous language permitting a litigant to request attorney fees "at any time," we conclude that the trial court did not err, either in its interpretation of the limiting language of the divorce judgment, or in its consideration of plaintiff's request for attorney fees incurred during postjudgment litigation. Furthermore, given (1) the trial court's findings of fact, which have ample evidentiary support in the record, that (a) several instances of defendant's unreasonable conduct caused plaintiff to incur attorney fees and

expenses, and (b) plaintiff's income left her unable to accommodate the attorney fees and costs she incurred, and (2) the language of MCL 552.13(1) and MCR 3.206(C) plainly authorizes an order for reimbursement of attorney fees and costs under the circumstances found by the trial court, we conclude that the trial court properly ordered defendant to reimburse plaintiff's attorney fees and costs. While defendant on appeal generally contests the trial court's findings of fact underlying plaintiff's entitlement to an award of attorney fees and costs, he neither offered any evidence, nor argues with specificity on appeal, in contradiction of the amounts contained in plaintiff's itemized list of fees and costs, on which the court relied in crafting the order of reimbursement.

C

Defendant next challenges the trial court's characterization of the attorney fee award as an order for child support arrearages. "Whether a trial court properly operated within the statutory framework relative to child support calculations and any deviation from the child support formula are reviewed de novo as questions of law." *Peterson v Peterson*, 272 Mich App 511, 516; 727 NW2d 393 (2006).

In *Krist v Krist*, 246 Mich App 59; 631 NW2d 53 (2001), this Court found that an arbitrator overseeing a divorce action did not exceed his authority when he required that monies he ordered paid to the plaintiff as part of a property settlement, if not paid by the defendant, would be deemed spousal support, to preclude the defendant from circumventing the award through bankruptcy. *Id*. at 65-66. This Court upheld the arbitrator's authority to protect the lump sum awarded to the plaintiff by imposing the nonpayment condition, explaining that "the language employed in the arbitrator's award was a mechanism to ensure that defendant husband did not obtain the lion's share of the marital estate and then subsequently discharge his obligation to plaintiff after the judgment of divorce was entered." *Id.* at 65. Accordingly, this Court has found that it is not error or beyond the authority of a trial court to characterize an award of attorney fees, or other lump sum payment, as support to protect it from a defendant's obstreperous behavior and to prevent potential dischargeability in bankruptcy.

D

Although a court may designate an award of attorney fees as in the nature of support, two problems arise here. First, cases like *Krist* involve the characterization of a monetary award as spousal support, not child support. In determining or awarding child support, a trial court must follow the formula set forth in the Michigan Child Support Formula Manual. *Peterson*, *supra* at 516, citing MCL 552.519(3)(a)(*vi*) and MCL 552.605(2). When a trial court orders child support, MCL 552.605(2) mandates the following:

> Except as otherwise provided in this section, the court shall order child support in an amount determined by application of the child support formula developed by the state friend of the court bureau as required in section 19 of the friend of the court act, MCL 552.519. The court may enter an order that deviates from the formula if the court determines from the facts of the case that application of the child support formula would be unjust or inappropriate and sets forth in writing or on the record all of the following:

(a) The child support amount determined by application of the child support formula.

(b) How the child support order deviates from the child support formula.

(c) The value of property or other support awarded instead of the payment of child support, if applicable.

(d) The reasons why application of the child support formula would be unjust or inappropriate in the case.

"Thus, as required by MCL 552.605(2), when deviating from the formula, the trial court fulfills its statutory duty only when the court has articulated its rationale in accordance with subsection 2(a) through (d)." *Peterson*, *supra* at 517. Although a court may modify a child support order "as the circumstances of the parents and the benefit of the children require," MCL 552.17(1), a child support order must rest on the application of the child support formula pursuant to legislative mandate. MCL 552.519(3)(a)(*vi*); *Ghidotti v Barber*, 459 Mich 189, 200; 586 NW2d 883 (1998). In this case, the trial court's order for payment of the award as a child support arrearage is inconsistent with the plain statutory language defining the methodology for child support calculation.

Second, the trial court exceeded its authority to the extent that it purported to address the dischargeability of the imposed debt. In *Brown v Felsen*, 442 US 127, 132-138; 99 S Ct 2205; 60 L Ed 2d 767 (1979), the United States Supreme Court held that a bankruptcy court looks beyond the evidence presented to support a state court judgment pertaining to a collection case, and is not bound by the doctrine of res judicata. Consequently, if a bankruptcy action is filed, only the bankruptcy court has authority to determine whether any of the debt owed qualifies as dischargeable in bankruptcy.

Here, the trial court apparently interpreted defendant's statement that an award of attorney fees would place him in danger of bankruptcy as a threat of future action to avoid the court-imposed fee payment obligation. The Bankruptcy Code excepts the following relevant debts from discharge:

(5) . . . a domestic support obligation;

* * *

(15) to a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit. [11 USC 523(a).]

When determining whether a particular debt meets the § 523(a)(5) exception to discharge, a bankruptcy court considers whether the debt is "actually in the nature of . . . support." *Shaver v Shaver*, 736 F2d 1314, 1316 (CA 9, 1984) (internal quotation omitted). This presents a factual

determination for the bankruptcy court as a matter of federal bankruptcy law. *Id*. In accordance with potential dischargeability determinations, the "term 'support' is to be broadly defined in order to protect the best interests of the child." *In re Lowther*, 321 F3d 946, 948 (CA 10, 2002). "To ensure that 'genuine support obligations are not improperly discharged(,) . . . the term 'support' will generally include obligations to pay attorney's fees incurred in a custody dispute." *Id*. (internal quotation omitted). "[C]ourt-ordered attorney's fees arising from post-divorce custody actions are deemed in the nature of support under § 523(a)(5) as being incurred on behalf of the child. This debt is nondischargeable." *In re Jones*, 9 F3d 878, 882 (CA 10, 1993).

In summary, we conclude that the trial court erred by ordering that the attorney fees be considered as child support arrearages, and by imposing the condition that defendant's obligation would be nondischargeable in some future bankruptcy proceeding. Child support awards must conform to the statutory requirements discussed above, and a nondischargeability determination falls within the bankruptcy court's exclusive purview.

E

Defendant further asserts that because he did not receive proper notice that the trial court's ultimate ruling might encompass a child support obligation, the award denied him due process. In a civil action, due process requires notice regarding the nature of the proceedings and an opportunity to be heard. The notice provided must "be reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Maxwell v Dep't of Environmental Quality*, 264 Mich App 567, 574; 692 NW2d 68 (2004). Due process does not require that a defendant know any potential outcome of the proceeding.

In this case, defendant does not deny receipt of the motion for attorney fees or notice of the hearing to address plaintiff's request, as reflected by a proof of service and confirmed by his presence and participation in the hearing. Defendant thus received reasonable and timely notice that the issue under review by the trial court was plaintiff's petition for payment of attorney fees, which constituted the sole subject matter addressed during the hearing. The mere fact that the trial court issued an order designating the award of attorney fees as child support did not infringe on defendant's right to due process.

F

We also reject defendant's argument that the award of attorney fees qualified as improper because he endured two sanctions for the same conduct. Defendant's argument confuses several distinct legal doctrines. Although defendant's argument invokes "res judicata," a closer analysis suggests that he complains that the trial court's order violated due process because it subjected him to double jeopardy. We view as a more accurate articulation of defendant's argument that he objects to having to pay both attorney fees and costs because the trial court's award is punitive in nature, rather than merely to secure reimbursement. Ultimately, however, we find support for none of these formulations.

1

The doctrine of res judicata precludes multiple lawsuits litigating the same cause of action. *Sewell v Clean Cut Mgt, Inc*, 463 Mich 569, 575; 621 NW2d 222 (2001). Res judicata bars a second or subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first. *Id*. This Court has assumed an encompassing approach to the doctrine of res judicata, emphasizing that it bars not only claims already litigated, but also any claim arising from the same transaction that the parties, in exercising reasonable diligence, could have raised but did not. *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999).

Res judicata does not encompass plaintiff's assertion of error because this litigation did not involve multiple actions. The sanctions imposed by the trial court merely reflect the continuing nature of this custody dispute and the trial court's initial restraint in awarding attorney fees. The trial court repeatedly reserved ruling on plaintiff's request for attorney fees, but did award her reimbursement of the costs arising from defendant's failures to comply with court orders regarding the submission of his computers for forensic analysis, and as a sanction for his refusal to turn over the videotape of their daughter's Bat Mitzvah. The sanctions imposed did not address in any respect the issue of attorney fees. The trial court's later award of attorney fees thus did not duplicate the sanctions previously ordered.

2

Defendant implies that the trial court's imposition of both costs and fees infringes on his right to remain free from double jeopardy. Both the United States and the Michigan constitutions protect an individual from twice being placed in jeopardy for a single offense. US Const, Am V; Const 1963, art 1, § 15. "The prohibition against double jeopardy provides three related protections: (1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense." *Dawson v Secretary of State*, 274 Mich App 723, 730-731 (opinion by Wilder, P.J.); 739 NW2d 339 (2007), quoting *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004) (emphasis omitted).

Contrary to defendant's insinuation, the preclusion against double jeopardy "protects only against the imposition of multiple criminal punishments and the same offense, and then only when such occurs in successive proceedings." *Dawson*, *supra* at 731, quoting *Hudson v United States*, 522 US 93, 99; 118 S Ct 488; 139 L Ed 2d 450 (1997) (emphasis omitted). Civil proceedings typically do not invoke double jeopardy protections unless "a threshold showing of punishment [exists] demonstrating that the civil penalty is overwhelmingly disproportionate to the government's damages and expenses." *People v Duranseau*, 221 Mich App 204, 207-208; 561 NW2d 111 (1997). Double jeopardy principles generally are not considered violated when a civil penalty serves a purpose distinct from any punitive purpose. *Id*. at 206.

Defendant has failed to make a showing that the trial court imposed a penalty so punitive in purpose or effect that it qualifies as criminal. *Duranseau*, *supra* at 207. The stated purpose of the trial court's ruling was to compensate plaintiff for the expenses she incurred because of defendant's conduct and, therefore, is distinct from the punitive purpose of a criminal sanction. Consequently, the civil award did not violate the double jeopardy principles.

3

Defendant's constitutional argument against the imposition of costs and attorney fees may also be evaluated as a contention that the award constitutes an excessive fine. US Const, Am VIII; Const 1963, art 1, § 16. The excessive fine prohibition deals with "criminal process and with direct actions initiated by government to inflict punishment," and does not apply to an award of damages in a civil case between private litigants, provided that the government has not participated in the prosecution of the action and does not retain the right to receive a share of the damage award. *Browning-Ferris Industries of Vermont, Inc v Kelco Disposal, Inc*, 492 US 257, 259-260, 262-264; 109 S Ct 2909; 106 L Ed 2d 219 (1989). Because no governmental unit claims any right to the instant award of attorney fees and costs, the excessive fine prohibition does not apply here.

4

Defendant finally suggests that the imposition of costs and attorney fees is improperly punitive in nature. As already discussed, the evidence supported the trial court's findings that (1) defendant continued to prolong this litigation by repeatedly failing to turn over the Bat Mitzvah tape, as the trial court had ordered, and (2) defendant or members of his household had improperly disseminated material from her psychological evaluation. As a result of defendant's behavior, plaintiff had to expend additional costs and incur more attorney fees to ascertain the extent of defendant's culpability and to secure enforcement of the trial court's orders. Because the trial court did not clearly err in its finding of fact that defendant's unreasonable conduct caused plaintiff to incur unnecessary legal fees for which she lacked the ability to pay, we detect no punitive element in the court's ultimate order for defendant to reimburse plaintiff's attorney fees and costs.[1]

G

Defendant further contends that the trial court should be disqualified from hearing any future issues in this case because of personal bias and prejudice against him. A trial court's findings of fact regarding a motion to disqualify a judge are reviewed for an abuse of discretion,

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[1] Although the trial court invoked MCL 552.13 and MCR 3.206(C) in ordering reimbursement, but did not specifically reference MCR 2.114(D)(3), we observe that its imposition of attorney fees also finds support in this subrule, which provides as follows:

> The signature of an attorney or party, whether or not the party is represented by an attorney, constitutes a certification by the signer that . . . the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

A sanction awarded under this subrule does not permit the inclusion of punitive damages, but a trial court may award "the reasonable expenses [the innocent party] incurred because of the filing of the document, including reasonable attorney fees." MCR 2.114(E). The court rule does not encompass sanctions only for signature and verification violations, but also permits a court to award sanctions for the filing of a frivolous claim or defense. MCR 2.114(F).

and the determination of the applicability of the facts to relevant law is reviewed de novo. *Cain v Dep't of Corrections*, 451 Mich 470, 503 n 38; 548 NW2d 210 (1996); *Armstrong v Ypsilanti Twp*, 248 Mich App 573, 596; 640 NW2d 321 (2001).

The Michigan Court Rules contemplate that a judge may be disqualified if she "cannot impartially hear a case" because she is "personally biased or prejudiced for or against a party or attorney." MCR 2.003(B)(1). A "heavy presumption of judicial impartiality" exists, and to overcome this presumption, a litigant must come forward with evidence of actual and extrajudicial personal bias or prejudice. *Cain*, *supra* at 495-497. To qualify as "extrajudicial," the bias must be personal and must "origin[ate] in events or sources of information gleaned outside the judicial proceeding." *Id*. at 495-496. "(J)udicial rulings, in and of themselves, almost never constitute a valid basis for a motion alleging bias, unless the judicial opinion displays a deep-seated favoritism or antagonism that would make fair judgment impossible." *Gates v Gates*, 256 Mich App 420, 440; 664 NW2d 231 (2003) (internal quotation omitted). This Court may remand a case to a different judge "if the original judge would have difficulty in putting aside previously expressed views or findings, if reassignment is advisable to preserve the appearance of justice, and if reassignment will not entail excessive waste or duplication." *Bayati v Bayati*, 264 Mich App 595, 602-603; 691 NW2d 812 (2004).

Defendant's motion to disqualify fails to overcome the heavy presumption of judicial impartiality. First, defendant cites no law in support of his position. "A party may not leave it to this Court to search for authority to sustain or reject its position." *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 57; 649 NW2d 783 (2002) (internal quotation omitted). Second, defendant cites only the trial court's rulings to support his personal bias contention. Defendant identifies no comments or remarks by the trial court tending to suggest intemperance or prejudice. The only allegation of extrajudicial bias stems from defendant's entirely unsupported assertion that the trial court's Lebanese ancestry predisposed it to prejudice against members of defendant's "new family," who "were Israeli citizens." Standing alone, this allegation does not suffice to justify disqualification.

Defendant attributes bias, in part, to rulings pertaining to the admissibility of evidence. Specifically, defendant refers to the trial court's rejection of his affidavit denying his ownership of more than one computer, and the court's refusal to admit a written statement from the director of his synagogue, Steven Weiss, to contradict plaintiff's assertion that Weiss advised her that defendant's wife had stolen the Bat Mitzvah videotape. Regarding defendant's affidavit pertaining to his computer, it does not comport with the requirements of MCR 2.119(B)(1)(a) and (c), because it fails to assert that defendant had personal knowledge regarding the presence of other computers in the home, and it does not "show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated in the affidavit." In reference to the letter from Weiss, defendant failed to authenticate the writing in accordance with MRE 901(b)(1) by having Weiss available to testify.

Defendant also complains that the trial court's refusal to sign subpoenas "prior to the June 27, 2006 hearing" and its "refus[al] to give a reason" evidence the court's bias. In support of this claim, defendant offers a "signed statement" from his current wife, dated September 11, 2006. Although defendant contends that the subpoenas were submitted "prior to the June 27, 2006 hearing," the proffered statement of his wife inconsistently asserts that she presented the subpoenas on "Wednesday, July 19, 2006." In any event, this Court will not consider the

statement by defendant's wife because it is not a part of the trial court record. MCR 7.210(A)(1); *Sherman*, *supra* at 56 (observing that a party may not expand the record on appeal).

As defendant acknowledges, the trial court's rulings regarding plaintiff's request to terminate or modify his parenting time were not unfavorable to him. These parenting time rulings directly contradict defendant's assertion of judicial bias or prejudice. To the extent that defendant relies on adverse procedural rulings by the trial court to establish bias or prejudice, these do not suffice to demonstrate a basis for judicial disqualification. *Cain*, *supra* at 496. In conclusion, we have found nothing to support defendant's claim that the trial court possessed an actual, extrajudicial personal bias against him.

We affirm the trial court's award of attorney fees to plaintiff, but we reverse to the extent that the order designates the attorney fees as a child support arrearage, and we remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher